90-1808 (1)

NO. _____

Supreme Court, U.S.
FILED
MAY 23 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

JOE NATHAN PRICE,
Petitioner,

V.

DIGITAL EQUIPMENT CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

JOE NATHAN PRICE
22131 North Fork
Katy, Texas 77450
(713) 392-9482
(713) 738-2882

PRO SE PETITIONER

NO. _____

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PRO SE PETITIONER

QUESTIONS PRESENTED

Whether This Case Is Time Barred by The Statue of Limitations and whether Plaintiff-Appellant Has Stated A Claim Under Title VII And Whether The Fifth Circuit And The District Court Judges Showed Bias In Their Opinions And Decisions To Dismiss This Case.

PARTIES

All parties to the proceeding are identified in the caption of the case.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

Petitioner Joe Nathan Price respectfully pray that a writ of certiorari issue is to review the judgment orders of the United States District Court For The Southern District Of Texas, Hou-

ston and opinions of the United States Court Of Appeals For The Fifth Circuit in Joe Nathan Price v. Digital Equipment Corporation.

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit, Circuit Judges Polita, Davis, and Barksdale and judgment of the Court of Appeals for the Fifth Circuit, Chief Judge Clark and Circuit Judges Williams and Davis.

JURISDICTION

This Court has jurisdiction to review judgments of the court of appeals under 28 U.S.C. $ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution is involved in the instant cause. Plaintiff is entitled to a fair trial by jury under the Constitution of the United States.

STATEMENT OF THE CASE

This case is the same case that was filed by Plaintiff February 4, 1986, and dismissed November 3, 1986, after the Plaintiff's attorney filed motions to withdraw as counselor and for the court to appoint an attorney to represent the Plaintiff in this cause, when Plaintiff could no longer afford to pay attorney fees. Pro se Plaintiff refiled this case on July 14, 1987, and the district

court again dismissed November 30, 1987. Plaintiff appealed to the Fifth Circuit January 22, 1988. On June 15, 1988 the Fifth Circuit vacated the district court judgment and remanded this case for further proceedings and again the district court dismissed January 16, 1989 and Plaintiff appealed to the Fifth Circuit. The appeal was denied May 4, 1989 and Plaintiff's Motion for Reconsideration was also denied June 6, 1989. Plaintiff filed petition to the Sumpreme Court of the United States for a Writ of Certiorari (No. 89-370), and was denied November 27, 1989 and this case was refiled in district court April 5, 1990.

SUMMARY ARGUMENT

The current and past president of our United Nation has both stated that: We don't need another Civil Rights Law

nor Quotas but what we need is good lawyers, judges, and employers to enforce the existing Laws of Civil Rights so to ensure equal empolyment opportunities and Equal Justice for all.

There has been only one published opinion by the United States Court of Appeals for the Fifth Circuit concerning this case and that was the opinion of Chief Judge Clark and Circuit Judges Williams and Davis. In their opinion; Timely Title VII suit which was dismissed without prejudice for want of prosecution did not toll 90-day period for bringing suit on Title VII claim. Civil Rights Act of 1964, $ 706(e), as amended, 42 U.S. C.A. $ 2000e-5(f).

This case has never been to trial and therefore the facts have never been

decided by a Jury nor Judge. Due to the continuing denials of Plaintiff's right decided by a Jury nor Judge. Due to the continuing denials of Plaintiff's right to seek redress in this cause and the failure of the Fifth Circuit and the district courts to uphold justice; the statute of limitations is a mute issue in this case.

ARGUMENT

I. This Case Is A Blatant Miscarriage Of Justice And Plaintiff Has Suffered Severely From This Cause.

Plaintiff now comes to this court, the Supreme Court of the United States, for the second time not to practice law nor harass Defendant but to seek Equal Justice under the fourteenth amendment of the United States Constitution.

The deciding factors in whether or not this case is worthy of a fair trial should not be that this suit is barred by the statute of limitations. Defendant has stated that Plaintiff has filed the same suit four times and Plaintiff agree with the Defendant that this is the same Original Complaint filed by Plaintiff, February 4, 1986 and that suit was filed within ninety days of Plaintiff's receipt of a right-to-sue letter from the EEOC. The Court of Appeals held that: "Timely filing of Title VII action which was later dismissed for failure to prosecute did not toll 90-day period for bringing a Title VII action."

II. This Case Is Not Time Barred By The Statue of Limitations Because The Original Complaint Was Filed Within

90-Days From the Date Of The Right-To-Sue Letter.

In an unpublished opinion, Before POLITA, DAVIS, and BARKSDALE, Circuit Judges, they stated: "The statue of limitations is not tolled by a suit dismissed because of lack of prosecution. Shaw v. Corcoran, 570 S.W. 2d 96, 98 (Tex. Civ. App. 1978). Nor is it tolled by a suit dismissed because of a plaintiff's failure to comply with discovery orders. Armstrong v. Ablon, 686 S.W. 2d 194, 196 (Tex. Ct.App.1984)." Plaintiff is not familiar with either case but do agree. However, Plaintiff do not agree with this Fifth Circuit's reiteration of the procedural history and facts as set forth in the first appeal to the Fifth Circuit and also feels that this opinion of the third appeal to the Fifth Circuit

have no precedential value.

In the opinion of the Fifth Circuit in the first appeal the Fifth Circuit held that: "Price's original Title VII claim was timely, but was dismissed without prejudice for want of prosecution. That lawsuit did not toll the ninety-day period for the Title VII claim. See Taylor, 775 F.2d at 619." That Fifth Circuit also stated that "The sole issue in this case is whether the district court correctly dismissed appellant's lawsuit as time barred. No disputed facts cloud the resolution of this legal issue and appellee has fully addressed the issue. All that remains is to apply well settled law to the facts." The judgment of the district court was vacated and this case was remanded for further proceedings consistent with this opinion.

III. The District Courts And The Fifth Circuit Courts, With The Exception Of The Fifth Circuit Presiding Chief Judge Clark And Circuit Judges Williams And Davis, Has Clearly Shown Bias In Their Opinions And Decisions In The Dismissal Of This Case.

Although there were two motions pending before the district court compelling discovery, the district court only ruled on Defendant's motion and dismissed this case without a hearing; even though the Plaintiff answered the Defendant's List of Interrogatories to the best of his ability.

In an unpublished opinion, Circuit Judges Polita, Davis, and Barksdale stated: "After remand, the district

court dismissed Price's suit for failure to comply with discovery orders. Price did not appeal from that dismissal." But as a Matter of Fact Plaintiff did appeal that dismissal with the United States Court of Appeals for the Fifth Circuit (No. 89-2141) on March 24, 1989. That appeal was dismiss, May 4, 1989, by Circuit Judges Reavley, Jones and Duhe' and no opinion or reason was given by the curcuit and rehearing was denied June 6, 1989. This Fact is clearly stated in in both the Appellant's and Appealle's Brief before the Fifth Circuit. In the past the Fifth Circuit has liberally construe the briefs of pro se appellants Abdul-Alim Amin v. Universal Life In-Insurance Co. of Memphis, 706 F.2d 638, 640 n. 1 (5th Cir. 1983). It is crystal clear to Appellant that this Fifth Cir-

cuit did not do so in this appeal by pro se Plaintiff-Appellant. It is also clear to Price that the district courts and Fifth Circuit courts showed bias in its' decision to dismiss this case.

CONCLUSION

In the opinion of the Fifth Circuit (NO. 87-6242) June 15, 1988, Chief Judge Clark and Circuit Judges Williams and Davis; "Timely Title VII suit which was dismissed without prejudice for want of prosecution did not toll 90-day period for bringing suit on Title VII claim." In the opinion of the Fifth Circuit (NO. 90-2725) February 27, 1991, Circuit Judges POLITA, DAVIS, and BARKSDALE; "The statue of limitations is not tolled by a suit dismissed because of lack of

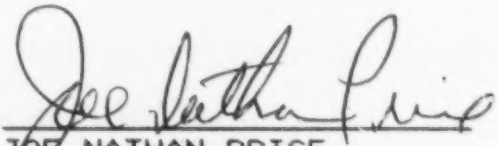
prosecution. Nor is it tolled by a suit dismissed because of a plaintiff's failure to comply with discovery orders." In so far as whether Petitioner has properly stated a claim under Title VII, Plaintiff filed in district court, December 19, 1988, a Separate Pretrial Order, after Defendant refused to file a Joint Pretrial Order, with the following attachments:

1. Plaintiff's Requested Quested in Jury Voir Dire.
2. Plainfiff's Proposed Jury Instructions.
3. Plaintiff's Proposed Jury Questions.
4. Plaintiff's Witness List.
5. Plaintiff's Exhibits List.

Joe Nathan Price, black citizen of the United States of America, is entitle to a Fair Trial in a Federal Court of

Law. For these various reasons and the circumstances surrounding this case, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



JOE NATHAN PRICE
22131 North Fork
Katy, Texas 77450
(713) 392-9482

PRO SE PETITIONER

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

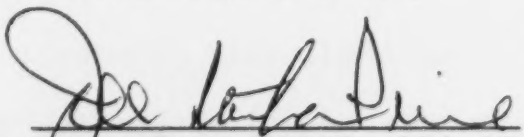
JOE NATHAN PRICE,
Petitioner,

V.

DIGITAL EQUIPMENT CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

I, Joe Nathan Price, hereby certify that on 22th day of May, 1991, three copies of Petitioner's Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid to Douglas E. Hamel, Attorney for Respondent, 2937 First City Tower, 1001 Fannin, Houston, Texas 77002-6760.



JOE NATHAN PRICE, PRO SE
22131 North Fork
Katy, Texas 77450

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2725
Summary Calendar

JOE NATHAN PRICE,

Plaintiff-Appellant,

VERSUS

DIGITAL EQUIPMENT CORPORATION,

Defendant-Appellee.

Appeal from the United States
District Court for the
Southern District of Texas
(CA-H-90-1169)

(February 27, 1991)

Before POLITZ, DAVIS, AND BARKSDALE,
Circuit Judges.

PER CURIAM:1

Joe Nathan Price appeals pro se from the district court's (1) dismissal of his complaint alleging violations of Title VII of Civil Rights Act of 1964

and 42 U.S.C. $ 1981 AND (2) imposition of sanctions under Fed. R. Civ. P. 11. The suit was dismissed on three grounds: (1) it was time barred; (2) Price failed to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6); and (3) Price failed to respond to Digital Equipment Corporation's (DEC) motion for dismissal and for sanctions and attorneys' fees.2 WE AFFIRM.

I

This is the second time this court has addressed Price's oft-filed employment discrimination suit against DEC. We reiterate much of the procedural history and facts as set forth in the first ap-

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1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to

peal. See Price V. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988) (per curiam), cert. denied, __ U.S. __, 110 S.Ct. 498 (1989).

Price was employed from January 1982, until October 1985, as a computer software specialist with DEC.Id.at 1027. In April 1984, Price sued DEC, alleging racial harassment in the workplace. The district court dismissed Price's lawsuit because Price did not serve process on DEC. Id. DEC discharged Price on October 3, 1985. Id.

On October 8, 1985, Price filed a complaint against DEC with the Equal Opportunity Employment Commission (EEOC). On December 3, 1985, the EEOC notified Price that he had the right to sue. Id.

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that rule, the court has determined that this opinion should no be published.

On February 4, 1986, Price filed his second suit against DEC in the district court alleging that DEC violated Title VII of the Civil Rights Act of 1964 by harassing and discharing him because of his race. The district court dismissed the suit without prejudice for failure to prosecute. Id. In July 1987, Price filed the action a third time, essentially tracking his earlier dismissed complaint, but also alleging DEC violated 42 U.S.C. $ 1981 by harassing and discharging him because of his race and in retaliation for filing both his earlier complaints with the EEOC and the lawsuit. The district court granted DEC

---

2 The district court cited its local rule 6(e), providing that a plaintiff's failure to respond to a defendant's motion "will be taken as a representation of no opposition." The record discloses that Price requested a hearing on DEC's motion, but did not file a response.

summary judgment and dismissed Price's suit, because his claims were time barred. Price appealed to this court; and we affirmed the dismissal of his Title VII claim, but remanded his § 1981 claim because it was not time barred. Price, 846 F.2d at 1027-28. After remand, the district court dismissed Price's suit for failure to comply with discovery orders. Price did not appeal from that dismissal.

On April 5, 1990, Price sued DEC for the fourth time, alleging facts and conclusions substantially identical to those in his 1986 and 1987 lawsuits. The district court dismissed Price's suit because it was both time barred and

---

Because we find the other bases for dismissal suffice, we do not address further Price's failure to respond.

failed to state a claim upon which relief could be granted.3 The district court also sanctioned Price under Fed. R. Civ. p. 11 for filing a suit that he could not reasonably believe...was well grounded in fact or warranted by existing law." After receiving DEC's affidavit regarding costs and attorney's fees, the district court entered final judgment, including requiring Price to pay DEC $2,962.27. Price timely appealed

II.

A.

Price urges again that his Title VII claim is not barred by the statute of limitations. This issue is foreclosed by

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3 We note that included as a minor and most perfunctory part of Price's Title VII claims is the allegation that DEC "has continued to interfer[e] with the Plaintiff's rights to secure employment

our earlier opinion. Price, 846 F.2d at 1027. We note that Price unsuccessfully petitioned in Price for both rehearing in this court and certiorari in the Supreme Court. We will not reconsider this issue.

B.

Price also appeals the dismissal of his $ 1981 claim. The district court dismissed this claim on two grounds: (1) it was time barred; and (2) Price failed to state a claim upon which relief could be granted.

1.

This court made it clear in the first appeal that we apply Texas two-

---

Price seeks a "Restraining Order." Although the district court did not address expressly this allegation and requested relief, we hold it was properly dismissed as part of the dismissal of this action. In any event, this was not by making false statements to potential employers of the Plaintiff," for which

year statue of limitations for personal injury suits to $ 1981 claims tried in Texas. Price, 846 F.2d at 1028; see also Owens V. Okure, 488 U.S. 235, 249-51 (1989). The statue of limitations is not tolled by a suit dismissed because of lack of prosecution. Shaw v. Corcoran, 570 S.W.2d 96, 98 (Tex. Civ. App. 1978). Nor is it tolled by a suit dismissed becaused of a plaintiff's failure to comply with discovery orders. Armstrong v. Ablon, 686 S.W.2d 194, 196 (Tex. Ct.App. 1984). Accordingly, even though Price brought two of his actions during the two-year limitations period, neither suit tolled the limitations period. Price was discharged on October 3, 1985; this action was filed on April 5, 1990,

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presented as an issue on appeal nor adequately briefed; instead, it was summarily referenced in the summary of the argument section of Price's brief.

long past the two-year limitations period.

2.

In the alternative, the district court also appropriately dismissed Price's § 1981 claim under Rule 2(b)(6). For that claim, Price alleges that DEC harassed him and ultimately fired him because of his race. The Supreme Court has held that such "post [contract] formation conduct by the employer relating to the terms and conditions of continuing employment" does not give rise to a cause of action under 42 U.S.C. § 1981. Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.ct. 2363, 2374 (1989); see also Carter v. South Central Bell, 912 F.2d 832, 839 (5th Cir. 1990).

C.

Price also contends that the dis-

trict court erred in imposing attorney's fees and costs as sanctions under Rule 11 before ascertaining that Price had received DEC's affidavit regarding such fees and costs. "Service by mail is complete upon mailing." Fed. R. Civ. P. 5(b). DEC's attorney certified that he had mailed a copy of the affidavit to Price on August 2, 1990. Rule 5(b) compels the presumption that he received the affidavit; and there is no evidence in the record supporting Price's assertion that he did not receive the affidavit. Price has demonstrated no error in this issue.

D.

On appeal, DEC has moved (1) for damages, including attorney's fees, and double costs; and (2) for Price to be enjoined from filing further lawsuits on these employment discriminatioin claims.

"If a court of appeals shall determine that a appealis frivolous, it may award just damages and single or double costs to the appellee." Fed. R. App. P. 38. An appeal is frivolous when it relies on legal points that are not arguable on their merits." Lyons v. Sheetz, 834 F.2d 493, 496 (5th Cir. 1987). This court imposes sanctions for frivolous appeals on both parties represented by cousel and parties acting pro se. Lyons, 834 F.2d at 496.

Needless to say, Price's appeal is without arguable merit. The district court, in its memorandum and order, and citing this court's earlier opinion, informed Price that his action was time barred. The district court also informed Price that he failed to state a claim

under $ 1981. Moreover, this court had already held that the 90-day period for bringing a Title VII claim was not tolled by Price's second suit and that Price's $ 1981 claim was subject to Texas' two-year personal injury statue of limitations. Price, 846 F.2d at 1027-28. Texas law clearly provides that neither Price's second nor third suits tolled the statute of limitations. And by August 1, 1990, when Price filed this notice of appeal, the law was more than clear in this circuit that $ 1981 does not govern claims of post-contractual racial harassment and termination. Walker v. South Central Bell Tel. Co., 904 F.2d at 275, 276-77 (5th Cir. 1990); see also Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805, 807-08 (5th Cir. 1990); Carroll v. General Accident

Insurance Co. of America, 891 F.2d 1174, 1177 (5th Cir. 1990).

Litigants, including those proceeding pro se, are under a duty to ascertain the factual and legal bases for both a complaint, Fed. R. Civ. P. 11, and an appeal, Fed. R. App. P. 38. Price failed in this duty on appeal; accordingly, Rule 38 sanctions and appropriate.

2.

Moreover, federal courts may enjoin litigants from bringing successive, frivolous lawsuits in the same claims. Harrelson v. United States, 613 F.2d 114 116 (5th Cir.1980); 28 U.S.C. $ 1651(a). Price has filed four lawsuits against DEC; the three complaints in the record contain identical allegations; and Price's first complaint, not included in the record, was apparently similar to

his later suits. See Price, 846 F.2d at 1027. Because further litigation on these claims would be more than frivolous and would serve only to burden further both the courts' strained resources and DEC, Price is enjoined from filing further lawsuits against DEC under Title VII or $ 1981 arising out on his employment with DEC for the period January 4, 1982, to October 8, 1985.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Joe Nathan Price is (1) enjoined from filing further suits against DEC for violations of Title VII or 42 U.S.C. $ 1981 based on the actions of DEC concerning Price's employment for the period January 4, 1982, to October 8, 1985; and (2) is advised that filing similar

claims, but simply under other theories, especially those that are time barred, may well result in the imposition of further sanctions.

DEC's motion for damages, in the form of attorney's fees and other expenses, and double costs for this appeal is GRANTED; and we REMAND to the district court for determination of the appropriate amount of attorney's fees and other expenses reasonably incurred by DEC by virtue of this appeal. The district court shall enter judgment against Price for such fees, expenses and double costs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ENTERED
SEP 4 1990
Jesse E. Clark,

JOE NATHAN PRICE,	&	
	&	
Plaintiff,	&	
	&	
V.	&	CIVIL ACTION
	&	NO. H-90-1169
	&	
DIGITAL EQUIPMENT CORPORATION,	&	
	&	
	&	
Defendant.	&	

FINAL JUDGMENT

In accordance with the Court's Memorandum and Order entered on July 24, 1990, and defendant's Affidavit on Attorney's Fees and Expenses, to which plaintiff has not responded, the Court ORDERS and ADJUDGES that plaintiff's action against defendant Digital Equipment Corporation is DISMISSED and that defendant recover from plaintiff

$2,962.27 with post-judgment interest at the rate of 7.95% per annum.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 24th day of August, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

\1990A\527

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ENTERED
JUL 24 1990
Jesse E. Clark,
Clerk

JOE NATHAN PRICE,	&	
	&	
Plaintiff,	&	
	&	
V.	&	CIVIL ACTION
	&	NO. H-90-1169
	&	
DIGITAL EQUIPMENT	&	
CORPORATION,	&	
	&	
Defendant.	&	

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Motion to Dismiss for Failure to State a Claim and for Sanctions and Attorneys' Fees (Docket Entry No. 2). To the extent that the motion relies on matters outside the pleadings, such as the attachments to defendant's supporting brief (Docket Entry No. 3), these

matters cannot be considered in connection with a Rule 12(b)(6) motion. However, the face of the plaintiff's complaint shows that: (1) all of his claims for relief are time-barred and, (2) his claim under 42 U.S.C. $ 1981, which complains only of conduct of the defendant after his employment relationship with defendant was formed, fails to state a cause of action under $ 1981. Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989). Furthermore, pursuant to Local Rule 6(e), the failure of plaintiff to respond to defendant's motion "will be taken as a representation of no opposition." Accordingly, for all of the above reasons, defendant's motion to dismiss is GRANTED.

Defendant also seeks sanctions under Fed. R. Civ. P. 11, which provides that

> The signature of . . . [a] party constitutes a Certificate by the signer that the signer has read the pleading . . .; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry is is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or cause . . . needless increase in the cost of litigation.

The fact that the plaintiff filed the same Title VII action that the Fifth Circuit previously held to be barred by limitations, Price v. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988), shows that he could not reasonably believe that his Title VII complaint was well grounded in fact or warranted by existing law. Likewise, Plaintiff could not reasonably believe that his $ 1981 claim for alleged conduct of defendant that occurred "until October 3, 1985, when Plaintiff's employment was termi-

nated . . ." (Original Complaint at paragraph 13) was well grounded in fact or warranted by existing law since the Fifth Circuit also held that a two-year statute of limitations applied to such a claim. Id. Furthermore, notwithstanding warnings by counsel for defendant that sanctions would be sought (Docket Entry No. 3, Ex. F), Plaintiff failed to dismiss this case.

The obligations imposed by Rule 11 and the penalties for their violation apply to pro se litigants such as Plaintiff as well as to litigants with counsel. Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-62 (7th Cir. 1987). The Court concludes that the filing of this suit was not done with a "belief formed after reasonable inquiry [that] it is well grounded in fact and is war-

ranted by existing law." The facts recited in the previous paragraph that underlie this conclusion, and the fact that this is the fourth action filed by Plaintiff against Digital Equipment Corporation alleging substantially[1] the same acts of discrimination, lead the Court to further conclude that this action was filed for the improper purpose of harassing the defendant.[2]

---

1 The first action did not allege wrongful discharge.

2 Although the first two actions were dismissed on procedural grounds after the plaintiff failed to obtain service and failed to prosecute his case, he nevertheless refiled the same actions.

A finding of a Rule 11 violation mandates sanctions of some type. Thomas v. Capital Security Service, Inc., 836 F.2d 866, 844 (5th Cir. 1988). In assessing sanctions the Court is aware of the fact that pro se litigants are generally to be treated less severely than those with counsel. However, the fact that this is the fourth action filed by Plaintiff, the fact that he filed this action after the Fifth Circuit had put him on notice of the limitations deficiencies that have resulted in the dismissal of this action, and the fact that defendant's counsel warned him that sanctions would be sought unless he dismissed this action, necessitate more than nominal sactions. The Court concludes that the appropriate sanction is

to require Plaintiff to reimburse defendant for its fees and expenses incurred in defending this action. Counsel for defendant is ORDERED to submit to the Court within 10 days from the entry of this Order an affidavit establishing its attorneys' fees and expenses in defending this action. Plaintiff will have 10 days from the receipt of the affidavit to file a response. After receipt of these papers the Court will enter a final judgment that imposes sanctions against Plaintiff.

SIGNERD at Houston, Texas, this 23rd day of July, 1990.

SIM LAKE
UNITED STATES DISTRICT JUDGE

JOE NATHAN PRICE, Plaintiff-Appellant,

v.

DIGITAL EQUIPMENT CORPORATION, Defendant-Appellee.

No. 87-6242
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 15, 1988.

Discharged employee brought employment discrimination action against former employer. The United States District Court for the Sourthern District of Texas, Lynn N. Hughes, J., dismissed and former employee appealed. The Court of Appeals held that: (1) timely filing of Title VII action which was later dismissed for failure to prosecute did not toll the 90-day period to bringing a Title VII action; (2) two-year statute

of limitations for personal injury actions in Texas, rather than one-year statute of limitations contained in the Texas Commission on Human Rights Act, governs claim of employment discrimination under & 1981; and (3) complaint brought within two years of employee's discharge was timely.

Vacated and remanded.

1. Civil Rights 40

Timely Title VII suit which was dismissed without prejudice for want of prosecution did not toll 90-day period for bringing suit on Title VII claim. Civil Rights Act of 1964, & 706(e), as amended, 42 U.S.C.A. & 2000e-5(f).

2. Federal Courts 714

Arguments must be briefed in order

to be preserved for review. F.R.A.P. Rule 28(a)(4), 28 U.S.C.A.

3. Federal Courts 715

Issue of statue of limitations would not be deemed waived, even though appellant's only reference in brief to the issue was to assert that "this action is not time barred," where appellee was not prejudiced by deficient brief, as the sole issue in the case was whether the district court properly dismissed the action as time barred. F.R.A.P. Rule 28(a(4), 28 U.S.C.A.

4. Civil Rights 13.10

To the extent that civil rights complaint alleged that employee was discharged because of race, complaint filed less than two years after discharge was timely where action was governed by Tex-

as two year statue of limitations for personal injury actions. 42 U.S.C.A. & 1981.

5. Civil rights 13.10

Texas two-year statue of limitations for personal injury actions, rather than the one-year statue of limitations in the Texas Commission on Human Rights Act, applies to employment discrimination action under & 1981. 42 U.S.C.A. & 1981; Vernon's Ann. Texas Civ. St. art. 5221k.

Appeal from the United States District Court For the Southern District of Texas.

Before CLARK, Chief Judge, WILLIAMS, and DAVIS, Circuit Judges.

PER CURIAM:

Pro se appellant Joe Nathan Price appeals from an adverse summary judgment rendered against him dismissing his employment discrimination suit on grounds that it is time barred. We vacate and remand for further proceedings.

Price was employed as a computer software specialist by Digital Equipment Corporation (DEC) from January 1982 until October 1985. In April 1984, Price sued DEC alleging that he was the victim of racial discrimination in the workplace. Defendant in that lawsuit did not receive service of process and the suit was dismissed for failure of service.

On October 3, 1985, DEC fired Price. Price immediately lodged an employment

discrimination complaint with the Equal Employment Opportunity Commission (EEOC), alleging that his discharge was racially motivated and violated Title VII of the Civil Rights Act of 1964, 42 U.S.C & 2000e et seq. On December 3, 1985, Price received from the EEOC a right-to-sue letter. On February 4, 1986, Price filed a Title VII action against DEC in federal court. In November 1986, the district court dismissed Price's suit without prejudice for failure to prosecute.

In July 1987, Price refiled substantially the same lawsuit that was dismissed in 1986, except that he included a claim under 42 U.S.C. & 1981. After a hearing, the district court granted DEC's motion for summary judgment on grounds that both Price's Title VII suit

and his & 1981 suit are time barred. The district court ruled that Price's Title VII suit is time barred because it was not filed within ninety days of Price's receipt of a right-to-sue letter from the EEOC. The court ruled that the Texas two-year statue of limitations for personal injury actions barred Price's & 1981 suit because Price knew as early as April 1984 of the facts giving rise to his complaint. Price appeals both dismissals.

[1] We agree with the district court that Price's Title VII suit is time barred. A private civil action under Title VII must be brought within ninety days of complainant's receipt of a right-to-sue letter from the EEOC. 42 U.S.C. & 2000e-5(f); see also Taylor v. Bunge Corp., 775 F.2d 617, 618 (5th Cir.1985).

Price's original Title VII claim was timely, but was dismissed without prejudice for want of prosecution. That lawsuit did not toll the ninety-day period for the Title VII claim. See Taylor, 775 F2.d at 619.

The district court ruled that Price's & 1981 claim is time barred because Price knew of the facts giving rise to the complaint in April 1984, more than two years before his July 1987 lawsuit. On appeal, Price asserts in summary fashion that the district court erred in dismissing his lawsuit as time barred.

[2,3] Appellee urges at the outset that appellant's brief waived the limitations issue because it lacks an argument as required by rule 28(a)(4), Fed. R.App.P. The only reference appellant makes to the district court's dismissal

of his lawsuit as time barred is to assert that "this action is not time barred." This fleeting reference points to the claimed error, but gives no analysis or authorities to support the assertion. Although we liberally construe the briefs of pro se appellants, Abdul-Alim Amin v. Universal Life Insurance Co of Memphis, 706 F.2d 638, 640 n. 1 (5th Cir. 1983), we also require that arguments must be briefed to be preserved. In re Texas Mortgage Services, Inc., 761 F.2d 1068, 1073-74 (5th Cir. 1985). If appellee had suggested any prejudice that resulted from appellant's inadequate brief we would probably consider the limitations issue waived. But we are unable to preceive any prejudice to appellee from appellant's deficient brief. The sole issue in this case is

whether the district court correctly dismissed appellant's lawsuit as time barred. No disputed facts cloud the resolution of this legal issue and appellee has fully addressed the issue. All that remains is to apply well settled law to the facts. Under these unique circumstances, we decline appellee's invitation to hold that appellant's brief waived the limitation issue. Cf. FSLIC v. Haralson, 813 F.2d 370, 37 n. 3 (11th Cir. 1987) (refusing to apply waiver because appellee not misled or hampered in its ability to respond).

[4] Price's complaint included allegations that he was discharged on account of his race in October 1985. because Price's discharge occurred less than two years before he filed this lawsuit, at least the part of the lawsuit

complaining of discriminatory discharge was timely filed. See Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir.), reh'g granted, 604 F.2d 449 (5th Cir. 1979), aff'd in part and reversed on other grounds, 619 F.2d 459, 463 (5th Cir. 1980), aff'd 452 U. S. 89, 101 S. Ct. 2193, 68 L. Ed.2d 693 (1981). We therefore remand this case to the district court for further proceedings.

[5] Defendant offers two additional bases on which to sustain the summary judgment; neither has merit. Defendant first argues that we should borrow the one-year statute of limitations from the Texas Commission on Human rights Act, Tex. Civ.Code & 5221k (1988). Defendant acknowledges that this circuit has consistently applied the Texas limitations

period for personal injury torts to § 1981 cases. Defendant contends, however, that the recently enacted Human Rights Act, which prohibits employment discrimination, now provides the more analogous Texas cause of action for employment discrimination suits filed under § 1981 suits.

In Goodman v. Lukens Steel Co., ---- U. S. ----, 107 S. Ct. 2617, 96 L.Ed.2d 572 (1987), plaintiffs argued that because § 1981 deals primarily with economic rights, especially contractual rights, a six-year limitation period governing suits for interference with contractual rights was the most analogous state limitations period and should be borrowed to govern their § 1981 suit. The Supreme Court rejected plaintiffs' argument and held that a single state

statute of limitations should govern all & 1981 claims and that the limitations period for personal injury torts is the most appropriate state statue of limitations. In reaching this conclusion, the Supreme Court held that the rule of Wilson v. Garcia, 417 U.S. 261, 266-68, 105 S.Ct. 1938, 1941-43, 85 L.Ed.2d 254 (1985),--- that the most analogous state statute of limitations for & 1983 lawsuits is the statute for personal injury tort actions--is also applicable to & 1981 lawsuits. Goodman, ---- U.S. at -- 107 S.Ct. at 2621, 96 L.Ed.2d at 582.

Since the Wilson decision, we have applied the Texas two-year limitations period to & 1983 suits tried in Texas. See Peter Henderson Oil v. City of Port Arthur, Texas, 806 F.2d 1273, 1264-75 (5th Cir. 1987); Longoria v. Cith of Bay

City, Texas, 779 F.2d 1136, 1137-38 (5th Cir.1986). Goodman requires that we do the same for this & 1981 action.

Defendant also argues that summary judgment in this case is proper because Price's complaint states only conclusory allegations and he has produced no evidence that would justify granting him a trial. The district court declined to consider whether Price stated a claim and ruled only on the limitation issue. Defendant's argument is better addressed to the district court.

For the reasons given above, the judgment of the district court is vacated and remanded for further proceedings consistent with this opinion.

VACATED and REMANDED.